

INSTRUCTIONS

FINAL PRETRIAL ORDER

Hon. William J. Martini, U.S.D.J.

1. THE ATTACHED FORM IS TO BE RETYPED IN FULL (INCLUDING ALL INSTRUCTIONS) AND ALL MATERIAL INSERTED IN PROPER SEQUENCE AND NOT BY MEANS OF ATTACHED RIDERS EXCEPT AS SPECIFICALLY SET FORTH BELOW.
2. NUMBER ALL PAGES.
3. AN ORIGINAL AND ONE COPY OF THE COMPLETED FINAL PRETRIAL ORDER MUST BE DELIVERED TO THE CHAMBERS OF MAGISTRATE JUDGE MARK FALK.
4. THE COPY, WHEN EXECUTED, WILL BE GIVEN TO JUDGE MARTINI. THE COPY MUST BE IN A THREE-RING BINDER.
5. EACH SECTION OF THE FINAL PRETRIAL ORDER MUST BEGIN ON A SEPARATE PAGE.
6. ALL NUMBERED SECTIONS OF THIS FINAL PRETRIAL ORDER MUST BE PRECEDED BY A CORRESPONDINGLY NUMBERED PAGE.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE: URETHANE ANTITRUST
LITIGATION

Master Docket No. 08-5169 (WJM) (MF)

FINAL PRETRIAL ORDER

A pretrial conference* having been held before the Honorable Mark Falk, U.S.M.J., Jeffrey M. Johnson, Richard J. Leveridge, Daniel P. Schaefer, and James E. Cecchi having appeared for Plaintiffs and David M. Bernick, William T. McEnroe, and Lawrence S. Lustberg having appeared for Defendant, this Final Pretrial Order is hereby entered:

*Time Incurred: _____

[PRECEDE WITH DIVIDER #1]

1. JURISDICTION (set forth specifically)

1. **Subject Matter Jurisdiction.** Subject matter jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1337, and Section 4 of the Clayton Act, 15 U.S.C. § 15(a). Subject matter jurisdiction is not disputed.

2. **Personal Jurisdiction.** Personal jurisdiction exists over Dow pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22. Personal jurisdiction is not disputed.

[PRECEDE WITH DIVIDER #2]

2. PENDING/CONTEMPLATED MOTIONS (Set forth all pending or contemplated motions, whether dispositive or addressed to discovery or the calendar. Also set forth the nature of the motion. If the Court indicated that it would rule on any matter at pretrial, summarize that matter and each party's contemplated in limine motions should also be set forth.)¹

1. Plaintiffs contemplate filing a motion *in limine* to preclude evidence of, argument regarding, or reference to Plaintiffs' conduct in their downstream markets, including but not limited to evidence tending to show that Plaintiffs' conduct violated the antitrust laws, that Plaintiffs' conduct in their downstream markets was similar to Dow's conduct in the urethanes market, or that Plaintiffs passed on inflated prices caused by antitrust violations in the urethanes market to their downstream customers.

2. Plaintiffs contemplate filing a motion *in limine* to preclude Dow from introducing evidence or argument regarding, or referring in any way to, Fifth Amendment invocations by Carpenter, Vitafoam, or Woodbridge witnesses.

3. Plaintiffs contemplate filing a motion *in limine* to preclude evidence that certain Plaintiffs who were defendants in the Foam Litigation, and/or expert witnesses called by those Plaintiffs in the Foam Litigation, took positions in the Foam Litigation that are different from the positions Plaintiffs, or expert witnesses called by Plaintiffs in this case, have taken in this case.

4. Plaintiffs contemplate filing a motion *in limine* to preclude evidence that the Department of Justice closed its investigation of Dow and its co-conspirators without filing a lawsuit.

5. Plaintiffs contemplate filing a motion *in limine* to preclude Barbour II, Schefsky and McCormick testimony as beyond the scope of and/or inconsistent with the Kansas Court's Order dated July 25, 2013 (Dkt. 2960) granting Dow's motion to modify the scheduling order.

6. Plaintiffs contemplate filing a motion *in limine* to limit Dow's examination of experts to conform with Dow's Rule 26 disclosures and Kansas Court's Memorandum and Order dated May 16, 2014 (Dkt. 3193), granting Plaintiffs' motion to strike.

7. Plaintiffs contemplate filing a motion *in limine* to limit the testimony of Professor Kenneth G. Elzinga.

8. Plaintiffs contemplate filing a motion *in limine* to exclude unavailable Bayer witnesses under Fed. R. Evid. 804(a)(1) and for instruction that no inferences can be drawn based on their absence.

9. Plaintiffs contemplate filing a motion *in limine* regarding unavailability of documents.

¹ Both sides intend to oppose motions listed herein, and the parties reserve all rights and objections with respect to these motions.

10. Plaintiffs contemplate filing a motion *in limine* to preclude reference to how Plaintiffs became involved in this case or to the case being lawyer driven.

11. Plaintiffs contemplate filing a motion *in limine* to preclude evidence of or reference to Plaintiffs' financial condition.

12. Plaintiffs contemplate filing a motion *in limine* under Fed. R. Evid. 403 to require Dow to shorten its 8,700 exhibit list based on undue delay, waste of time, and needless presentation of cumulative evidence.

13. Plaintiffs contemplate filing a motion *in limine* to exclude Dow's deposition designations from Plaintiffs' case-in-chief that are beyond the scope of proper cross and completeness designations.

14. Plaintiffs contemplate filing a motion *in limine* to exclude the testimony of Patrick Ho.²

15. Dow filed a motion to exclude the expert testimony of Plaintiffs' damages expert Dr. Marx (MDL Dkt. 3152), which was denied in part and remains pending in part (MDL Dkt. 3193).

16. Plaintiffs filed a letter application requesting that Judge Falk strike the 1,700 proposed exhibits on Dow's exhibit list consisting of documents Dow obtained from the Foam Litigation. Plaintiffs contend that the application is properly pending before Judge Falk; Dow disputes this (Dkt. 55).

17. Dow filed a motion *in limine* to admit documents filed in the Foam Litigation, which remains pending (Dkt. 66).

18. Dow contemplates filing a motion to amend the caption to reference only current parties.

19. Dow contemplates filing a motion *in limine* to exclude any reference to or evidence of Dow's overall financial condition,³ including but not limited to its revenues, assets, profits, net worth, size, value, and/or market capitalization.

20. Dow contemplates filing a motion *in limine* to preclude Plaintiffs and their witnesses from referring to any other price-fixing or other antitrust case against Dow, by name or otherwise, or from discussing the evidence in other price-fixing cases or alleged conspiracies without obtaining prior court approval.

² In the alternative, Plaintiffs recently requested that Dow provide Plaintiffs with a proffer of the topics to which Mr. Ho intends to testify and also make Mr. Ho available for a pretrial deposition on a date and in a place convenient to him. Dow is considering this request.

³ Dow reserves the right to address at trial the profitability (or lack thereof) of the specific lines of business at issue in this litigation.

21. Dow contemplates filing a motion *in limine* to preclude Plaintiffs and their witnesses from referring to the fact of the class trial or class claims asserted in *In re Urethane Antitrust Litigation*, No. 2:04-cv-01616 (D. Kan.), including but not limited to any reference to or reliance on the testimony of the class plaintiffs' or the class plaintiffs' experts (*see, e.g.*, Pls.' Statement of Contested Facts ¶ 549). This does not cover evidence that is common between this case and the class case.

22. Dow contemplates filing a motion *in limine* to exclude any reference to or evidence of internal antitrust compliance policies of companies other than Dow and Dow's internal legal advice regarding its own antitrust compliance policies (*see, e.g.*, TDCC_PU1771447-54).

23. Dow contemplates filing a motion *in limine* to exclude any evidence relating to an internal investigation by Bayer's counsel, including but not limited to the fact of communications between Plaintiffs' counsel and Bayer's counsel and all information that derives from or relates to Bayer's counsel or their activities (*see, e.g.*, Plaintiffs' Exhibit 534 (Bates White memorandum regarding questions for Phil Proger); Plaintiffs' Exhibit 535 (Bates White memorandum regarding interview of Phil Proger); Plaintiffs' Exhibit 605 (Leslie Marx memorandum regarding interview of Phil Proger); Pls.' Statement of Contested Facts ¶¶ 44-47, 110-119, 143-148, 186-187, 502-503).

24. Dow contemplates filing a motion *in limine* to exclude any reference to or evidence of witnesses allegedly declining to provide testimony in this action.

25. Dow contemplates filing a motion *in limine* to exclude Plaintiffs' Exhibit 442 (October 1995 BASF memorandum).

26. Dow contemplates filing a motion *in limine* to preclude any reference to or evidence about the number of documents Dow and alleged co-conspirators produced from the time period 1994 through 1998, or other aspects of their document productions, including but not limited to evidence or argument regarding document retention policies or alleged destruction of documents.

27. Dow contemplates filing a motion *in limine* to preclude Plaintiffs and their witnesses from referring to former Defendants in this action as "defendants."

28. Dow contemplates filing a motion *in limine* to preclude Plaintiffs and their witnesses from referring to Dow and its alleged co-conspirators as "conspirators" or "co-conspirators."

29. Dow contemplates filing a motion *in limine* to preclude Plaintiffs and their witnesses from referring to any allegations or facts relating to the sale of polyurethanes outside of the United States, including but not limited to facts regarding the business activities of Dow or alleged co-conspirators outside the United States and Plaintiffs' purchases of polyurethanes outside of the United States.

30. Dow contemplates filing a motion *in limine* to preclude any reference to or evidence regarding any alleged conspiracy to restrict capacity (*see, e.g.*, Pls.' Statement of Contested Facts ¶ 190).

31. Dow contemplates filing a motion *in limine* to preclude any reference to or evidence regarding claims barred by the statute of limitations; for example, tolling on the basis of the class action does not apply to (a) claims that were not asserted in the class action or (2) claims that were already barred by the statute of limitations when the class action was filed.

32. Dow contemplates filing a motion to compel Plaintiffs to produce as live witnesses at trial current employees, officers, directors, agents, and owners of Plaintiffs, and to make available to Dow for live testimony at trial any witness whose testimony Plaintiffs intend to present live at trial.

33. Dow contemplates filing a motion *in limine* to preclude Plaintiffs from using depositions at trial in a manner contrary to Fed. R. Civ. P. 32.

34. Dow contemplates filing a motion *in limine* challenging the qualifications of Plaintiffs' expert (*see* Section 6 *infra*).

35. Dow contemplates filing a motion *in limine* to exclude the testimony of Daniel Schaefer.

36. Dow contemplates filing a motion *in limine* to exclude the testimony of any of Plaintiffs' proposed witnesses who have not been deposed in this case.

Stipulations Regarding Motions in Limine

The parties have reached the following agreements:

1. The parties will not make reference to or seek to introduce evidence or argument regarding settlements or settlement discussions with former Defendants, with Dow, or with alleged co-conspirators, except that if the Court were to deny Dow's motion *in limine* 23 above, then the parties may refer to and introduce evidence or argument regarding the Bayer settlement in this case.⁴

2. The parties will not make reference to or seek to introduce evidence or argument that the antitrust laws provide for treble damages.

3. The parties will not make reference to or seek to introduce evidence or argument with respect to any purported conspiracy to fix the price of polyether polyol systems, but the parties are not precluded from mentioning systems.

⁴ This agreement does not preclude Dow from arguing to the Court that the Court must reduce the amount of any judgment against Dow to account for amounts Plaintiffs recovered from Dow's alleged co-conspirators.

[PRECEDE WITH DIVIDER #3]

3. STIPULATION OF FACTS (Set forth in numbered paragraphs all uncontested facts, including all answers to interrogatories and admissions to which the parties agree.)

1. Between 1994 and 2003, Dow sold certain TDI, MDI, and polyether polyol products in interstate commerce.

[PRECED E WITH DIVIDER #4]

4. **CONTESTED FACTS** (Proofs shall be limited at trial to the contested facts set forth. Failure to set forth any contested facts shall be deemed a waiver thereof.)

A. Plaintiffs:

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Bar Color	Approximate Length (%)
Black	80
White	40
Black	100
White	95
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Age Group	Should Take Action (%)	Should Not Take Action (%)
18-29	85	15
30-49	85	15
50-69	85	15
70+	85	15

Response	Percentage
U.S. should take action against the Russian invasion of Ukraine	90%
U.S. should not take action against the Russian invasion of Ukraine	10%

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B. Defendant:

1. Dow did not engage in any contract, combination, or conspiracy with its competitors to fix, raise, maintain, or stabilize the price of any of the three categories of urethane chemicals at issue in this case—MDI, TDI, and/or Polyether Polyols (collectively, “urethane chemicals”)—for any portion of the time period alleged in Plaintiffs’ complaints (1994 to 2004) or Plaintiffs’ revised conspiracy period of 1994-2003 (“alleged conspiracy period”).

2. Moreover, Dow did not participate in a conspiracy with any or all of its competitors in the urethanes industry during the alleged conspiracy period: Bayer, BASF, Huntsman, and/or Lyondell or their affiliates or predecessors in interest.

3. Plaintiffs did not suffer any injury in their business or property by reason of the alleged conspiracy. Plaintiffs did not pay higher prices than they otherwise would have, and Plaintiffs suffered no damages.

4. Dow did not conceal any conspiracy from Plaintiffs during the alleged conspiracy period.

5. Dow did not actively mislead any Plaintiffs through the use of price increase announcements or through any others means during the alleged conspiracy period.

6. The basis for Plaintiffs’ claims—which Dow contests—was known to Plaintiffs long before November 23, 2004, which is evidenced in part by the testimony of Jorge Burtin, assignee of Plaintiff Skypark.

7. In any event, Plaintiffs failed to exercise due diligence to discover the basis for their claims.

8. Plaintiffs' purchases of urethanes chemicals from outside the United States, in particular from Canada, do not give rise to any claims against Dow or any alleged co-conspirator.

9. The stated reasons for Dow's price increase announcements during the alleged conspiracy period were accurate, legitimate, and reasonable.

Background

10. During the alleged conspiracy period, business conditions in the urethanes industry varied: the market conditions were at times favorable to suppliers, including Dow, and at other times unfavorable to suppliers.

11. In this sophisticated industry, both buyers and sellers can develop negotiation leverage without any collusion, depending upon market conditions. Thus, when demand for consumer products containing foam is high and the capacity to produce it is tight, it can be a sellers' market, and sellers of urethanes have bargaining power. When demand is soft and capacity is available, buyers can have the bargaining power.

12. Both Dow as a seller and Plaintiffs as buyers understood these market dynamics and were determined and sophisticated negotiators. Thus, the prevailing economic conditions at different periods of time directly affected the ability of urethanes suppliers, including Dow, to raise or lower the prices charged to their customers.

13. During a period of time extending from the mid-1990's through the end of 2003, business conditions in the urethanes industry were generally unfavorable to suppliers: demand for urethane chemicals was soft, capacity was plentiful, and prices remained essentially flat. As a result, Plaintiffs took advantage of the then-existing buyers' market and used their leverage as large customers and strong negotiators to keep prices low.

14. Because of the state of the market, competition between other producers, and advantages possessed by Plaintiffs, Dow's overall urethanes business at times suffered significant losses.

15. It was only after the alleged conspiracy ended that the market began to turn, prices for urethane products began to rise, and urethanes producers began to recover from their losses.

Plaintiffs and Their Theory of the Case

16. The Plaintiffs are all very different. They differ in size, the products they sold, the urethane products they purchased, and the producers from whom they purchased those urethane products.

17. Their transactions with the various urethanes suppliers and with Dow varied; and each transaction was negotiated separately, one-on-one with the selling urethanes producer.

18. These one-on-one negotiations between Dow and its customers were often highly contentious. Individual plaintiffs would use their considerable purchasing power to play

suppliers off of each other to extract the best prices they could, and suppliers—including Dow—often bent over backwards to win business from their competitors.

19. Not surprisingly, no Plaintiffs have testified as to liability or damages in this case. Instead, all Plaintiffs rely solely upon their counsel and hired experts.

20. Plaintiffs' theory of this case turns upon price increase announcements issued periodically throughout the alleged conspiracy period by Dow and the other urethanes producers.

21. The price increase announcements—usually in the form of letters—served the legitimate interest of notifying customers in advance of any change in urethanes pricing.

22. The announcements did not include the actual price but only the change in price, and, most importantly, only began a process of customer-by-customer, contract-by-contract price negotiations to determine the actual price that would be charged to Plaintiffs in a given purchase.

23. The actual prices ultimately charged varied between suppliers and between customers, in part because Plaintiffs themselves monitored raw material prices and thus had a difference of opinion on whether a given price increase on a particular urethane product was actually necessary.

24. Moreover, Plaintiffs had varying incentives on whether to accept a given price increase announcement and pass those costs onto their customers (perhaps with an additional markup), or to fight the price increase in light of their bargaining power in the then-buyers' market.

25. The vigorous competition among suppliers is a primary reason why the economic evidence is not consistent with the operation of a cartel, and in fact, Dow often lost money due to the vigorous competition during the alleged conspiracy period.

Evidence to be Presented at Trial

26. The simple fact of price increase announcements is unexceptional in the urethanes industry (or any industry for that matter).

27. Also unexceptional is the fact that suppliers in the urethanes industry would often announce similar price increases at or around the same time. Indeed, this is to be expected in an oligopolistic industry, such as the urethanes industry, where factors like raw material costs affect every company in the industry.

28. In fact, Plaintiffs participated in the same business practices with regard to price increase announcements for their own products.

29. The same logic applies to any inferences of collusion Plaintiffs wish to draw from the fact that competitors often met both formally and informally in meetings and at trade conferences—occurrences which are both expected and inevitable in an oligopolistic industry (like the urethanes industry) where competitors are also clients and customers in swaps and buy-

sell transactions and share mutual interests. Such meetings were for legitimate business purposes.

30. As to actual prices, no witness has provided any direct evidence of any agreement between Dow or any of its competitors in the urethanes industry on actual prices.

31. Moreover, economic evidence does not support any allegation of price fixing. Although Plaintiffs allege that prices would have fallen further absent some collusion to keep prices inflated, the evidence shows that costs did not fall during the alleged conspiracy period, and neither did demand for the urethane products at issue. Basic economic principles instruct that absent falling demand or falling costs, prices would not fall in a non-collusive market.

32. Moreover, there is no evidence of a pattern of sticking prices. In fact, the evidence shows that most of the proposed price increases failed to take effect—which is why prices stayed flat. Indeed, the transaction data provided by Dow and the other urethanes producers actually shows that the price in each of the three urethanes categories went *down* (not up) during the alleged conspiracy period.

33. Additionally, the fact that price increase announcements were issued frequently throughout the alleged conspiracy period is further evidence that price increases repeatedly failed to take effect, primarily due to competition between urethane producers and the bargaining power of Plaintiffs and other purchasers.

34. Plaintiffs' experts and their models do not establish liability either. In fact, the models and the opinions of Plaintiffs' experts are not supported by law and are not supported by the evidence in this case.

35. Plaintiffs' statistical model remarkably avoids making any economic or statistical assessment of the history of the alleged conspiracy period generally and avoids making any specific analysis of whether the price increase announcements issued by Dow and the other urethanes producers went into effect in some way that reflected collusion. In fact, price increase announcements are not even taken into account in Plaintiffs' model, and neither is any other allegedly collusive act. At bottom, Plaintiffs' experts have not even reached a conclusion as to whether there was collusion, much less what it was, and they have not designed a model tailored to it.

36. Additionally, Plaintiffs' model does not meet the established methodological standards for admission. Indeed, two of the three product line models do not yield statistically significant results; none of the models, which are designed to be predictive forecasting models, actually pass basic tests for predictive power; and all of the models were "estimated" using variables that were subjectively chosen to "fit" the benchmark period as closely as possible, thereby assuring that the same would not be true during the alleged conspiracy period at issue.

37. Thus, as a matter of law, Plaintiffs' model cannot support a finding of liability on the part of Dow.

38. Finally, Plaintiffs' expert cannot explain how the facts, as they relate to Plaintiffs themselves, support the alleged conspiracy. To the contrary, the evidence shows that different

prices were being charged by different urethanes suppliers to the same customer, at the same time. Additionally, customers used their leverage to extract lower prices from urethanes suppliers and/or to punish suppliers that insisted on enforcing a given price increase. These core instances of competition, which Plaintiffs fully enjoyed, could not be explained by Plaintiffs' expert.

[PRECEDDE WITH DIVIDER #5]

5. FACT WITNESSES: (Aside from those called for impeachment purpose, only the fact witnesses set forth by name and address may testify at trial. No summary of testimony is necessary.)¹

A. Plaintiffs:

Witnesses Plaintiffs Anticipate Calling Live

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¹ Both sides reserve the right to call any of the witnesses they presently anticipate calling live via video deposition should those witnesses be unavailable live for trial. Further, both sides reserve all rights and objections with respect to the parties' witness lists. Both sides reserve the right to identify at a later date additional witnesses for the purpose of authenticating exhibits, including summary exhibits, to the extent the parties are not able to reach agreement regarding such issues, and the parties reserve their rights to object to any such witnesses within a reasonable time after they are identified.

6. John Quackenbush (Lubrizol)

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11. Bruce O'Brien (Woodbridge)

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12. Joseph Plati (Woodbridge)

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13. Stuart Watson (Carpenter)

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² It is anticipated that Mr. Schaefer will serve as a Fed. R. Evid. 1006 summary witness to testify to the preparation of summary exhibits. Plaintiffs, however, reserve the right to identify and bring a different summary witness to trial to testify about the preparation of summary exhibits.

20. Amy Smedley (Regarding Huntsman International LLC Documents)
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21. Barbara Heimann (Regarding Lyondell Chemical Company Documents)³
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³ Other settling defendants' records custodians will be identified, in the event that Plaintiffs are forced to bring live witnesses from these companies to establish the admissibility of their documents.

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B. Defendant:

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Witnesses Currently or Formerly Affiliated with Dow

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⁴ As noted above Dow reserves the right to identify additional witnesses for the purpose of authenticating exhibits, including summary exhibits, to the extent the parties are not able to reach agreement regarding such issues.

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22. Martin Cosgrove (Vita)

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25. David Scott Wheeler (Woodbridge)

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Third-Party Witnesses

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31. Jerry Fosnaugh

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32. William Kincaid

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33. Marco Levi

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34. Donald Marquette

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36. Lynn Schefsky

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37. Dale Wingate

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42. David Freidinger (BASF)

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50. John Houston (Bayer)

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⁵ Dow reserves the right to call any of these witnesses live if Plaintiffs bring them to trial. Dow notes, for example, that Plaintiffs intend to have Stuart Watson, Jeffrey Briney, James Boehm, Alan Weber, Sandon Wool, and Bruce O'Brien testify live at trial.

63. Franklin Hurst (Carpenter)

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65. Stuart Watson (Carpenter)

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66. Jeffrey Briney (Flexible Foam Products)

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67. Michael Crowell (Flexible Foam Products)

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68. James Boehm (Foam Supplies)

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71. Hunter Lee Lunsford (Hickory Springs)

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72. Mark Talbert (Huber)

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73. Alan Weber (Huber)

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74. Larry Heppe (Leggett & Platt)

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75. Clyde Scott (Leggett & Platt)

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76. Joe York (Leggett & Platt)

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77. Sandon Wool (MarChem)

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78. John Bruno (Vita)

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79. Michael Curti (Crest Foam (Vita))

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80. Helen Ebert (Vita and Pathway Polymers)

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81. Jeffrey Gomberg (Synair (Vita))

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82. Thomas Laursen (Vita)

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83. Richard Loftin (Vita)

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84. Raj Mehta (Crest Foam (Vita))

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85. Franklin Sasser (Vita)

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[PRECEDATE WITH DIVIDER #6]

6. EXPERT WITNESSES: (No expert shall be permitted to testify at trial unless identified below by name and address and unless the expert's curriculum vitae and report are attached hereto. An expert's qualifications may not be questioned unless the basis therefor is set forth herein.)¹

A. Plaintiffs:

Leslie M. Marx, Ph.D.

c/o Dickstein Shapiro LLP
1825 Eye Street, N.W.
Washington, D.C. 20006

B. Defendant's objections to plaintiff's expert qualifications:

Dow incorporates by reference its pending *Daubert* motion (*see* MDL Dkt. 3152, 3193). Dow also objects to Dr. Marx's qualifications to the extent she intends to offer testimony regarding the credibility of witnesses or other persons, or legal conclusions, or other matters that involve the interpretation of alleged evidence of conspiratorial conduct, require expertise in the urethanes industry, or are otherwise outside her area of expertise. Dow's objections to Dr. Marx's qualifications will be the subject of a motion *in limine* Dow intends to file with the Court (*see* Parties' Pending, Contemplated Motions, *supra*), and Dow also reserves the right to raise such issues at trial.

C. Defendant:

Kenneth G. Elzinga, Ph.D.

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1095 Avenue of the Americas
New York, NY 10036-6797

Keith R. Ugone, Ph.D.

c/o Dechert LLP
David M. Bernick, Esq.
1095 Avenue of the Americas
New York, NY 10036-6797

¹ If the parties stipulate to an expert's qualifications there is no need to attach a curriculum vitae. In any event, however the expert's report must be attached.

D. Plaintiff's objections to defendant's expert qualifications:

Plaintiffs object to Dr. Elzinga's qualifications to the extent he intends to offer testimony on matters of statistics, econometrics, or accounting or matters that require the interpretation of direct evidence of conspiratorial conduct or expertise in the urethanes industry. Plaintiffs' objections to Professor Elzinga's qualifications, along with objections to the fitness and reliability of his opinions, will be the subject of a motion *in limine* Plaintiffs intend to file with the Court (*see* Parties' Pending, Contemplated Motions, *supra*).

[PRECEDE WITH DIVIDER #7]

7. DEPOSITION: Not later than _____, any party seeking to offer evidence by deposition shall so advise the opposing parties. Within 14 days thereof, all parties are directed to prepare a joint agreed statement, in narrative form, of the testimony which would be given by the deponent if called under oath. No colloquy between counsel shall be included. The agreed statement is not a concession of the factual accuracy of the deponent's testimony. Absent prior leave of Court, no deposition testimony may be offered except as provided herein.

Within 14 days of the first date above, the parties shall simultaneously exchange and submit to the Court any objections to the deposition testimony proposed above. The objections shall note, separately as to each such challenged portion of the deposition, applicable cases or rules which underlie the objection. If a party fails to comply with this paragraph, the challenged deposition testimony shall deemed admitted.

SEE ATTACHED DEPOSITION DESIGNATION
CHARTS BY PARTY AND BY WITNESS

[PRECEDATE WITH DIVIDER #8]

8. EXHIBITS (Except for exhibits the need for which could not reasonably have been foreseen or which are used solely for impeachment purposes, only the exhibits set forth on the exhibit list attached hereto may introduced at trial. Objections to authenticity are deemed waived unless such objections are set forth).^{1, 2}

A. Plaintiffs: Please see attached exhibit list.

B. Defendant's objections to authenticity:

1. Plaintiffs' Exhibit 1
2. Plaintiffs' Exhibit 3
3. Plaintiffs' Exhibit 17
4. Plaintiffs' Exhibit 20
5. Plaintiffs' Exhibit 32
6. Plaintiffs' Exhibit 36
7. Plaintiffs' Exhibit 47
8. Plaintiffs' Exhibit 65
9. Plaintiffs' Exhibit 76
10. Plaintiffs' Exhibit 83
11. Plaintiffs' Exhibit 86
12. Plaintiffs' Exhibit 87
13. Plaintiffs' Exhibit 88
14. Plaintiffs' Exhibit 92

¹ The exhibit lists should follow this page.

² Both sides agree that demonstratives, records custodian declarations, and summary exhibits may be identified at a later date, and to the extent the parties are not able to reach agreements regarding such issues, they reserve their rights to object to any such exhibits within a reasonable time after they are identified. The parties have been negotiating conditions regarding the pre-admission of certain exhibits and hope to reach an agreement on that issue prior to trial.

15. Plaintiffs' Exhibit 98
16. Plaintiffs' Exhibit 102
17. Plaintiffs' Exhibit 104
18. Plaintiffs' Exhibit 105
19. Plaintiffs' Exhibit 107
20. Plaintiffs' Exhibit 117
21. Plaintiffs' Exhibit 119
22. Plaintiffs' Exhibit 122
23. Plaintiffs' Exhibit 128
24. Plaintiffs' Exhibit 132
25. Plaintiffs' Exhibit 135
26. Plaintiffs' Exhibit 143
27. Plaintiffs' Exhibit 144
28. Plaintiffs' Exhibit 155
29. Plaintiffs' Exhibit 156
30. Plaintiffs' Exhibit 157
31. Plaintiffs' Exhibit 162
32. Plaintiffs' Exhibit 168
33. Plaintiffs' Exhibit 169
34. Plaintiffs' Exhibit 176
35. Plaintiffs' Exhibit 179
36. Plaintiffs' Exhibit 191
37. Plaintiffs' Exhibit 193

- 38. Plaintiffs' Exhibit 194
- 39. Plaintiffs' Exhibit 205
- 40. Plaintiffs' Exhibit 206
- 41. Plaintiffs' Exhibit 208
- 42. Plaintiffs' Exhibit 209
- 43. Plaintiffs' Exhibit 216
- 44. Plaintiffs' Exhibit 217
- 45. Plaintiffs' Exhibit 218
- 46. Plaintiffs' Exhibit 219
- 47. Plaintiffs' Exhibit 220
- 48. Plaintiffs' Exhibit 221
- 49. Plaintiffs' Exhibit 223
- 50. Plaintiffs' Exhibit 253
- 51. Plaintiffs' Exhibit 257
- 52. Plaintiffs' Exhibit 258
- 53. Plaintiffs' Exhibit 273
- 54. Plaintiffs' Exhibit 291
- 55. Plaintiffs' Exhibit 303
- 56. Plaintiffs' Exhibit 317
- 57. Plaintiffs' Exhibit 334
- 58. Plaintiffs' Exhibit 338
- 59. Plaintiffs' Exhibit 339
- 60. Plaintiffs' Exhibit 343

- 61. Plaintiffs' Exhibit 347
- 62. Plaintiffs' Exhibit 348
- 63. Plaintiffs' Exhibit 349
- 64. Plaintiffs' Exhibit 350
- 65. Plaintiffs' Exhibit 352
- 66. Plaintiffs' Exhibit 363
- 67. Plaintiffs' Exhibit 451
- 68. Plaintiffs' Exhibit 488
- 69. Plaintiffs' Exhibit 489
- 70. Plaintiffs' Exhibit 506
- 71. Plaintiffs' Exhibit 516
- 72. Plaintiffs' Exhibit 541
- 73. Plaintiffs' Exhibit 553
- 74. Plaintiffs' Exhibit 554
- 75. Plaintiffs' Exhibit 555
- 76. Plaintiffs' Exhibit 556
- 77. Plaintiffs' Exhibit 557
- 78. Plaintiffs' Exhibit 558
- 79. Plaintiffs' Exhibit 559
- 80. Plaintiffs' Exhibit 560
- 81. Plaintiffs' Exhibit 561
- 82. Plaintiffs' Exhibit 562
- 83. Plaintiffs' Exhibit 563

- 84. Plaintiffs' Exhibit 564
- 85. Plaintiffs' Exhibit 565
- 86. Plaintiffs' Exhibit 566
- 87. Plaintiffs' Exhibit 567
- 88. Plaintiffs' Exhibit 568
- 89. Plaintiffs' Exhibit 569
- 90. Plaintiffs' Exhibit 570
- 91. Plaintiffs' Exhibit 571
- 92. Plaintiffs' Exhibit 572
- 93. Plaintiffs' Exhibit 573
- 94. Plaintiffs' Exhibit 574
- 95. Plaintiffs' Exhibit 575
- 96. Plaintiffs' Exhibit 576
- 97. Plaintiffs' Exhibit 577
- 98. Plaintiffs' Exhibit 578
- 99. Plaintiffs' Exhibit 579
- 100. Plaintiffs' Exhibit 605
- 101. Plaintiffs' Exhibit 606
- 102. Plaintiffs' Exhibit 607
- 103. Plaintiffs' Exhibit 608
- 104. Plaintiffs' Exhibit 609
- 105. Plaintiffs' Exhibit 610
- 106. Plaintiffs' Exhibit 611

- 107. Plaintiffs' Exhibit 612
- 108. Plaintiffs' Exhibit 616
- 109. Plaintiffs' Exhibit 617
- 110. Plaintiffs' Exhibit 618
- 111. Plaintiffs' Exhibit 620
- 112. Plaintiffs' Exhibit 621
- 113. Plaintiffs' Exhibit 623
- 114. Plaintiffs' Exhibit 624
- 115. Plaintiffs' Exhibit 625
- 116. Plaintiffs' Exhibit 626
- 117. Plaintiffs' Exhibit 627
- 118. Plaintiffs' Exhibit 641
- 119. Plaintiffs' Exhibit 642
- 120. Plaintiffs' Exhibit 643
- 121. Plaintiffs' Exhibit 644
- 122. Plaintiffs' Exhibit 645
- 123. Plaintiffs' Exhibit 646
- 124. Plaintiffs' Exhibit 647
- 125. Plaintiffs' Exhibit 648
- 126. Plaintiffs' Exhibit 649
- 127. Plaintiffs' Exhibit 655
- 128. Plaintiffs' Exhibit 659
- 129. Plaintiffs' Exhibit 660

- 130. Plaintiffs' Exhibit 662
- 131. Plaintiffs' Exhibit 664
- 132. Plaintiffs' Exhibit 665
- 133. Plaintiffs' Exhibit 666
- 134. Plaintiffs' Exhibit 667
- 135. Plaintiffs' Exhibit 668
- 136. Plaintiffs' Exhibit 687
- 137. Plaintiffs' Exhibit 688
- 138. Plaintiffs' Exhibit 692
- 139. Plaintiffs' Exhibit 697
- 140. Plaintiffs' Exhibit 698
- 141. Plaintiffs' Exhibit 699
- 142. Plaintiffs' Exhibit 700
- 143. Plaintiffs' Exhibit 702
- 144. Plaintiffs' Exhibit 731
- 145. Plaintiffs' Exhibit 735
- 146. Plaintiffs' Exhibit 736
- 147. Plaintiffs' Exhibit 737
- 148. Plaintiffs' Exhibit 743
- 149. Plaintiffs' Exhibit 767
- 150. Plaintiffs' Exhibit 788
- 151. Plaintiffs' Exhibit 807
- 152. Plaintiffs' Exhibit 809

- 153. Plaintiffs' Exhibit 818
- 154. Plaintiffs' Exhibit 824
- 155. Plaintiffs' Exhibit 830
- 156. Plaintiffs' Exhibit 837
- 157. Plaintiffs' Exhibit 838
- 158. Plaintiffs' Exhibit 847
- 159. Plaintiffs' Exhibit 879
- 160. Plaintiffs' Exhibit 886
- 161. Plaintiffs' Exhibit 890
- 162. Plaintiffs' Exhibit 892
- 163. Plaintiffs' Exhibit 897
- 164. Plaintiffs' Exhibit 904
- 165. Plaintiffs' Exhibit 906
- 166. Plaintiffs' Exhibit 917
- 167. Plaintiffs' Exhibit 918
- 168. Plaintiffs' Exhibit 919
- 169. Plaintiffs' Exhibit 920
- 170. Plaintiffs' Exhibit 921
- 171. Plaintiffs' Exhibit 922
- 172. Plaintiffs' Exhibit 923
- 173. Plaintiffs' Exhibit 924
- 174. Plaintiffs' Exhibit 925
- 175. Plaintiffs' Exhibit 926

- 176. Plaintiffs' Exhibit 927
- 177. Plaintiffs' Exhibit 928
- 178. Plaintiffs' Exhibit 929
- 179. Plaintiffs' Exhibit 930
- 180. Plaintiffs' Exhibit 936
- 181. Plaintiffs' Exhibit 948
- 182. Plaintiffs' Exhibit 954
- 183. Plaintiffs' Exhibit 966
- 184. Plaintiffs' Exhibit 968
- 185. Plaintiffs' Exhibit 996
- 186. Plaintiffs' Exhibit 997
- 187. Plaintiffs' Exhibit 998
- 188. Plaintiffs' Exhibit 999
- 189. Plaintiffs' Exhibit 1013
- 190. Plaintiffs' Exhibit 1014
- 191. Plaintiffs' Exhibit 1016
- 192. Plaintiffs' Exhibit 1017
- 193. Plaintiffs' Exhibit 1018
- 194. Plaintiffs' Exhibit 1030
- 195. Plaintiffs' Exhibit 1031
- 196. Plaintiffs' Exhibit 1045
- 197. Plaintiffs' Exhibit 1047
- 198. Plaintiffs' Exhibit 1060

- 199. Plaintiffs' Exhibit 1064
- 200. Plaintiffs' Exhibit 1078
- 201. Plaintiffs' Exhibit 1081
- 202. Plaintiffs' Exhibit 1082
- 203. Plaintiffs' Exhibit 1089
- 204. Plaintiffs' Exhibit 1100
- 205. Plaintiffs' Exhibit 1101
- 206. Plaintiffs' Exhibit 1124
- 207. Plaintiffs' Exhibit 1125
- 208. Plaintiffs' Exhibit 1127
- 209. Plaintiffs' Exhibit 1137
- 210. Plaintiffs' Exhibit 1148
- 211. Plaintiffs' Exhibit 1160
- 212. Plaintiffs' Exhibit 1162
- 213. Plaintiffs' Exhibit 1163
- 214. Plaintiffs' Exhibit 1164
- 215. Plaintiffs' Exhibit 1169
- 216. Plaintiffs' Exhibit 1191
- 217. Plaintiffs' Exhibit 1192
- 218. Plaintiffs' Exhibit 1218
- 219. Plaintiffs' Exhibit 1234
- 220. Plaintiffs' Exhibit 1236
- 221. Plaintiffs' Exhibit 1237

- 222. Plaintiffs' Exhibit 1242
- 223. Plaintiffs' Exhibit 1251
- 224. Plaintiffs' Exhibit 1308
- 225. Plaintiffs' Exhibit 1309
- 226. Plaintiffs' Exhibit 1310
- 227. Plaintiffs' Exhibit 1311
- 228. Plaintiffs' Exhibit 1312
- 229. Plaintiffs' Exhibit 1314
- 230. Plaintiffs' Exhibit 1315
- 231. Plaintiffs' Exhibit 1318
- 232. Plaintiffs' Exhibit 1382
- 233. Plaintiffs' Exhibit 1386
- 234. Plaintiffs' Exhibit 1387
- 235. Plaintiffs' Exhibit 1392
- 236. Plaintiffs' Exhibit 1393
- 237. Plaintiffs' Exhibit 1394

C. Defendant: Please see attached exhibit list.

D. Plaintiff's objections to authenticity:

- 1. Defendant's Exhibit 23
- 2. Defendant's Exhibit 65
- 3. Defendant's Exhibit 66
- 4. Defendant's Exhibit 70
- 5. Defendant's Exhibit 87

6. Defendant's Exhibit 104
7. Defendant's Exhibit 108
8. Defendant's Exhibit 113
9. Defendant's Exhibit 114
10. Defendant's Exhibit 121
11. Defendant's Exhibit 126
12. Defendant's Exhibit 128
13. Defendant's Exhibit 129
14. Defendant's Exhibit 130
15. Defendant's Exhibit 151
16. Defendant's Exhibit 152
17. Defendant's Exhibit 208
18. Defendant's Exhibit 215
19. Defendant's Exhibit 223
20. Defendant's Exhibit 317
21. Defendant's Exhibit 318
22. Defendant's Exhibit 336
23. Defendant's Exhibit 350
24. Defendant's Exhibit 354
25. Defendant's Exhibit 369
26. Defendant's Exhibit 370
27. Defendant's Exhibit 423
28. Defendant's Exhibit 435

- 29. Defendant's Exhibit 442
- 30. Defendant's Exhibit 479
- 31. Defendant's Exhibit 480
- 32. Defendant's Exhibit 489
- 33. Defendant's Exhibit 506
- 34. Defendant's Exhibit 507
- 35. Defendant's Exhibit 509
- 36. Defendant's Exhibit 511
- 37. Defendant's Exhibit 530
- 38. Defendant's Exhibit 534
- 39. Defendant's Exhibit 548
- 40. Defendant's Exhibit 549
- 41. Defendant's Exhibit 560
- 42. Defendant's Exhibit 563
- 43. Defendant's Exhibit 581
- 44. Defendant's Exhibit 582
- 45. Defendant's Exhibit 589
- 46. Defendant's Exhibit 611
- 47. Defendant's Exhibit 615
- 48. Defendant's Exhibit 619
- 49. Defendant's Exhibit 623
- 50. Defendant's Exhibit 624
- 51. Defendant's Exhibit 625

- 52. Defendant's Exhibit 626
- 53. Defendant's Exhibit 633
- 54. Defendant's Exhibit 666
- 55. Defendant's Exhibit 667
- 56. Defendant's Exhibit 678
- 57. Defendant's Exhibit 684
- 58. Defendant's Exhibit 685
- 59. Defendant's Exhibit 698
- 60. Defendant's Exhibit 708
- 61. Defendant's Exhibit 715
- 62. Defendant's Exhibit 716
- 63. Defendant's Exhibit 717
- 64. Defendant's Exhibit 718
- 65. Defendant's Exhibit 719
- 66. Defendant's Exhibit 721
- 67. Defendant's Exhibit 724
- 68. Defendant's Exhibit 725
- 69. Defendant's Exhibit 729
- 70. Defendant's Exhibit 742
- 71. Defendant's Exhibit 744
- 72. Defendant's Exhibit 795
- 73. Defendant's Exhibit 817
- 74. Defendant's Exhibit 829

- 75. Defendant's Exhibit 846
- 76. Defendant's Exhibit 853
- 77. Defendant's Exhibit 857
- 78. Defendant's Exhibit 909
- 79. Defendant's Exhibit 985
- 80. Defendant's Exhibit 989
- 81. Defendant's Exhibit 994
- 82. Defendant's Exhibit 1008
- 83. Defendant's Exhibit 1089
- 84. Defendant's Exhibit 1090
- 85. Defendant's Exhibit 1099
- 86. Defendant's Exhibit 1150
- 87. Defendant's Exhibit 1188
- 88. Defendant's Exhibit 1229
- 89. Defendant's Exhibit 1230
- 90. Defendant's Exhibit 1231
- 91. Defendant's Exhibit 1252
- 92. Defendant's Exhibit 1264
- 93. Defendant's Exhibit 1284
- 94. Defendant's Exhibit 1297
- 95. Defendant's Exhibit 1298
- 96. Defendant's Exhibit 1299
- 97. Defendant's Exhibit 1305

- 98. Defendant's Exhibit 1309
- 99. Defendant's Exhibit 1314
- 100. Defendant's Exhibit 1324
- 101. Defendant's Exhibit 1325
- 102. Defendant's Exhibit 1326
- 103. Defendant's Exhibit 1329
- 104. Defendant's Exhibit 1331
- 105. Defendant's Exhibit 1334
- 106. Defendant's Exhibit 1340
- 107. Defendant's Exhibit 1351
- 108. Defendant's Exhibit 1352
- 109. Defendant's Exhibit 1353
- 110. Defendant's Exhibit 1360
- 111. Defendant's Exhibit 1361
- 112. Defendant's Exhibit 1362
- 113. Defendant's Exhibit 1363
- 114. Defendant's Exhibit 1364
- 115. Defendant's Exhibit 1365
- 116. Defendant's Exhibit 1370
- 117. Defendant's Exhibit 1372
- 118. Defendant's Exhibit 1374
- 119. Defendant's Exhibit 1375
- 120. Defendant's Exhibit 1376

- 121. Defendant's Exhibit 1377
- 122. Defendant's Exhibit 1385
- 123. Defendant's Exhibit 1390
- 124. Defendant's Exhibit 1391
- 125. Defendant's Exhibit 1392
- 126. Defendant's Exhibit 1400
- 127. Defendant's Exhibit 1429
- 128. Defendant's Exhibit 1430
- 129. Defendant's Exhibit 1436
- 130. Defendant's Exhibit 1452
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- 920. Defendant's Exhibit 6214
- 921. Defendant's Exhibit 6215
- 922. Defendant's Exhibit 6216
- 923. Defendant's Exhibit 6217
- 924. Defendant's Exhibit 6218
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- 926. Defendant's Exhibit 6220
- 927. Defendant's Exhibit 6221
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- 972. Defendant's Exhibit 6267
- 973. Defendant's Exhibit 6269
- 974. Defendant's Exhibit 6270
- 975. Defendant's Exhibit 6307
- 976. Defendant's Exhibit 6308
- 977. Defendant's Exhibit 6309
- 978. Defendant's Exhibit 6311
- 979. Defendant's Exhibit 6312
- 980. Defendant's Exhibit 6313
- 981. Defendant's Exhibit 6314
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- 983. Defendant's Exhibit 6319
- 984. Defendant's Exhibit 6321
- 985. Defendant's Exhibit 6322
- 986. Defendant's Exhibit 6324
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- 989. Defendant's Exhibit 6327
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- 992. Defendant's Exhibit 6331
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- 998. Defendant's Exhibit 6338
- 999. Defendant's Exhibit 6339
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- 1001. Defendant's Exhibit 6347
- 1002. Defendant's Exhibit 6348
- 1003. Defendant's Exhibit 6349
- 1004. Defendant's Exhibit 6350
- 1005. Defendant's Exhibit 6351
- 1006. Defendant's Exhibit 6357
- 1007. Defendant's Exhibit 6358
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- 1009. Defendant's Exhibit 6368
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- 1011. Defendant's Exhibit 6373
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- 1018. Defendant's Exhibit 6380
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- 1091. Defendant's Exhibit 6549
- 1092. Defendant's Exhibit 6691
- 1093. Defendant's Exhibit 6692
- 1094. Defendant's Exhibit 6697
- 1095. Defendant's Exhibit 6698
- 1096. Defendant's Exhibit 6699
- 1097. Defendant's Exhibit 6700
- 1098. Defendant's Exhibit 6701
- 1099. Defendant's Exhibit 6702
- 1100. Defendant's Exhibit 6703
- 1101. Defendant's Exhibit 6758
- 1102. Defendant's Exhibit 6759
- 1103. Defendant's Exhibit 6760
- 1104. Defendant's Exhibit 6761
- 1105. Defendant's Exhibit 6763
- 1106. Defendant's Exhibit 6764
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- 1110. Defendant's Exhibit 6768
- 1111. Defendant's Exhibit 6769
- 1112. Defendant's Exhibit 6770
- 1113. Defendant's Exhibit 6771
- 1114. Defendant's Exhibit 6772
- 1115. Defendant's Exhibit 6773
- 1116. Defendant's Exhibit 6774
- 1117. Defendant's Exhibit 6775
- 1118. Defendant's Exhibit 6776
- 1119. Defendant's Exhibit 6777
- 1120. Defendant's Exhibit 6778
- 1121. Defendant's Exhibit 6779
- 1122. Defendant's Exhibit 6780
- 1123. Defendant's Exhibit 6781
- 1124. Defendant's Exhibit 6782
- 1125. Defendant's Exhibit 6787
- 1126. Defendant's Exhibit 6794
- 1127. Defendant's Exhibit 6795
- 1128. Defendant's Exhibit 6796
- 1129. Defendant's Exhibit 6797
- 1130. Defendant's Exhibit 6798
- 1131. Defendant's Exhibit 6799
- 1132. Defendant's Exhibit 6800

- 1133. Defendant's Exhibit 6801
- 1134. Defendant's Exhibit 6802
- 1135. Defendant's Exhibit 6803
- 1136. Defendant's Exhibit 6804
- 1137. Defendant's Exhibit 6805
- 1138. Defendant's Exhibit 6806
- 1139. Defendant's Exhibit 6807
- 1140. Defendant's Exhibit 6808
- 1141. Defendant's Exhibit 6809
- 1142. Defendant's Exhibit 6810
- 1143. Defendant's Exhibit 6822
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- 1146. Defendant's Exhibit 6829
- 1147. Defendant's Exhibit 6830
- 1148. Defendant's Exhibit 6831
- 1149. Defendant's Exhibit 6832
- 1150. Defendant's Exhibit 6833
- 1151. Defendant's Exhibit 6834
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- 1153. Defendant's Exhibit 6836
- 1154. Defendant's Exhibit 6837
- 1155. Defendant's Exhibit 6838

- 1156. Defendant's Exhibit 6841
- 1157. Defendant's Exhibit 6842
- 1158. Defendant's Exhibit 6843
- 1159. Defendant's Exhibit 6849
- 1160. Defendant's Exhibit 8595
- 1161. Defendant's Exhibit 8596
- 1162. Defendant's Exhibit 8597
- 1163. Defendant's Exhibit 8598
- 1164. Defendant's Exhibit 8599
- 1165. Defendant's Exhibit 8600
- 1166. Defendant's Exhibit 8609
- 1167. Defendant's Exhibit 8610
- 1168. Defendant's Exhibit 8626
- 1169. Defendant's Exhibit 8629
- 1170. Defendant's Exhibit 8631
- 1171. Defendant's Exhibit 8633
- 1172. Defendant's Exhibit 8634
- 1173. Defendant's Exhibit 8661

[PRECEDDE WITH DIVIDER #9]

9. SINGLE LIST OF LEGAL ISSUES (All issues shall be set forth below. The parties need not agree on any issue. Any issue not listed shall be deemed waived.)¹

A. Plaintiffs:

1. What factors and evidence the jury can consider in determining whether there was a conspiracy among urethane manufacturers to fix, raise, maintain, and/or stabilize the prices of urethane products in violation of Section 1 of the Sherman Act.

2. Whether there was a conspiracy among urethane manufacturers to fix, raise, maintain, and/or stabilize the prices of urethane products.

3. Whether Dow was a member of the conspiracy.

4. Whether the conspiracy occurred in or affected interstate, import or foreign commerce.

5. Whether each Plaintiff sustained an injury in fact to its business or property.

6. Whether the conduct of Dow or its co-conspirators was a material cause of injury to Plaintiffs.

7. The applicable legal standard for fraudulent concealment.

8. Whether Dow and its co-conspirators fraudulently concealed the conspiracy.

9. When Plaintiffs could have discovered the conspiracy with reasonable diligence.

10. Whether any of Plaintiffs' purchases should be deemed subject to the Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a ("FTAIA").

B. Defendant:

11. The legal standard for proving conspiracy in an antitrust case, including but not limited to the standard for proving conspiracy through circumstantial evidence in an oligopolistic industry.

12. The legal standard for proving impact/injury in an antitrust case.

13. The legal standard for proving causation in an antitrust case.

14. The legal standard for proving damages in an antitrust case.

¹ Both sides also incorporate by reference the legal issues reflected in their list of Pending/Contemplated Motions (*see* Section 2 *supra*).

15. The legal standard for proving fraudulent concealment in an antitrust case.
16. The sufficiency of Plaintiffs' proof regarding the existence of the alleged conspiracy, including but not limited to the sufficiency of the econometric "model" proffered by Plaintiffs' expert in this case.
17. The sufficiency of Plaintiffs' proof regarding Dow's participation in the alleged conspiracy.
18. The sufficiency of Plaintiffs' proof regarding alleged co-conspirators' participation in the alleged conspiracy.
19. The sufficiency of Plaintiffs' proof regarding the products subject to the alleged conspiracy.
20. The sufficiency of Plaintiffs' proof regarding the time period of the alleged conspiracy.
21. The sufficiency of each Plaintiff's proof of impact/injury to its business or property by reason of the alleged conspiracy, including but not limited to the sufficiency of the econometric "model" proffered by Plaintiffs' expert in this case.
22. The sufficiency of each Plaintiff's proof as to causation, including but not limited to the sufficiency of the econometric "model" proffered by Plaintiffs' expert in this case.
23. The sufficiency of each Plaintiff's proof as to the amount of its alleged damages, including but not limited to the sufficiency of the econometric "model" proffered by Plaintiffs' expert in this case.
24. The sufficiency of each Plaintiff's proof as to its entitlement to recover damages for purchases by persons or entities that are not named as Plaintiffs in this case.
25. The sufficiency of each Plaintiff's proof as to the timeliness of its claim and the elements of fraudulent concealment.
26. Whether Plaintiffs' claims are barred in whole or in part by the statute of limitations.
27. Whether Plaintiffs' claims are barred in whole or in part by the Foreign Trade Antitrust Improvements Act.
28. The legal standard for admitting evidence of econometric "models" such as the one proffered by Plaintiffs' expert in this case (*see, e.g.*, Dow's pending *Daubert* motion (MDL Dkt. 3152)).
29. The extent to which expert testimony in general—and Plaintiffs' proposed expert testimony in particular—can be used as evidence of conspiracy, impact/injury, causation, and/or damages in an antitrust case.

30. The appropriate standard for statistical significance.
31. Whether Plaintiffs' claims are barred in whole or in part because their alleged damages, if any, are speculative and because of the impossibility of the ascertainment and allocation of such alleged damages.
32. Whether any award of damages would violate Dow's due process or other constitutional rights.
33. Whether Plaintiffs' claims are barred in whole or in part by their failure to mitigate damages.
34. Whether Dow may be held liable for treble damages, costs of suit, attorneys' fees, and/or interest.
35. Whether the statements of alleged co-conspirators may be used against Dow.
36. Whether Dow may be held jointly and severally liable for the conduct of alleged co-conspirators.
37. Whether Dow is entitled to set off for any award of damages due to Plaintiffs' settlements with alleged co-conspirators.
38. Whether Plaintiffs should be estopped from taking positions in this litigation inconsistent with those they took in this or other litigation, including but not limited to *In re Polyurethane Foam Antitrust Litigation*, No. 10-md-2196 (N.D. Ohio), and any appeals therefrom; and/or whether these fundamentally inconsistent positions should preclude Plaintiffs from prosecuting their case.
39. Whether any of the Plaintiffs' claims are barred in whole or in part by the doctrine of judicial estoppel.
40. Whether the jury may draw any adverse inference based on the refusal of Plaintiffs' current and/or former employees to testify on Fifth Amendment grounds.

[PRECEDE WITH DIVIDER #10]

10: CONCLUSION

- A. MISCELLANEOUS: (Set forth any matters which require action or should be brought to the attention of the Court.)
- B. TRIAL COUNSEL: (List the names of trial counsel for all parties.)

Plaintiffs:

Jeffrey M. Johnson
Richard J. Leveridge
James R. Martin
James E. Cecchi
Lindsey H. Taylor

Defendant:

David M. Bernick
Lawrence S. Lustberg
Jonathan R. Streeter
Carolyn M. Hazard
William T. McEnroe

C. JURY TRIALS:

Not later than _____

1. Each party shall submit to the District Judge and to opposing counsel a trial brief in accordance with Local Civil Rule 7.2.(b) (SEE ATTACHED “RIDER ON LENGTH OF BRIEFS”) with citations to authorities cited and arguments in support of its position on all disputed issues of law. THE BRIEF SHALL ALSO ADDRESS ANY ANTICIPATED EVIDENCE DISPUTE. In the event a brief is not submitted, the delinquent party’s pleading may be stricken.

2. Any hypothetical questions to be put to an expert witness on direct examination shall be submitted to the District Judge and to opposing counsel.

3. Each party shall submit to the District Judge and to opposing counsel proposed voir dire.

4. Plaintiff shall submit to opposing counsel, in writing, proposed jury instructions. Each instruction shall be on a separate sheet of legal sized paper and shall be numbered in sequence. Each instruction shall include citations to authorities, if any.

Within 7 days of the above, opposing counsel shall, on the face of the instructions submitted by plaintiff, set forth any objections to the proposed jury instructions and/or proposed counter-instructions.

D. NON-JURY TRIALS: Not later than _____

1. Each party shall submit to the District Judge and to opposing counsel a trial brief in accordance with Local Civil Rule 7.2(b) (SEE ATTACHED "RIDER ON LENGTH OF BRIEFS") with citations to authorities cited and arguments in support of its position on all disputed issues of law. THE BRIEF SHALL ALSO ADDRESS ANY ANTICIPATED EVIDENCE DISPUTE. In the event a brief is not submitted, the delinquent party's pleading may be stricken.

2. Any hypothetical questions to put to an expert witness on direct examination shall be submitted to the District Judge and to opposing counsel.

3. Proposed Findings of Fact and Conclusions of Law shall be submitted to the District Judge and to opposing counsel after the close of evidence. These shall include annotations to trial transcripts and exhibits.

E. BIFURCATION (When appropriate, liability issues shall be severed and tried to verdict. Thereafter, damage issues will be tried to the same jury.)

F. ESTIMATED LENGTH OF TRIAL

_____ days for liability and

_____ days for damages.

G. TRIAL DATE: _____

AMENDMENTS TO THIS FINAL PRETRIAL ORDER SHALL NOT BE PERMITTED UNLESS THE COURT DETERMINES THAT MANIFEST INJUSTICE WOULD RESULT IF THE AMENDMENT IS DISALLOWED. THE COURT MAY FROM TIME TO TIME SCHEDULE CONFERENCES AS MAY BE REQUIRED EITHER ON ITS OWN MOTION OR AT THE REQUEST OF COUNSEL.

Attorneys for Plaintiff

Attorneys for Defendant

Hon. Mark Falk
United States Magistrate Judge

RIDER ON LENGTH OF BRIEFS

The attention of the parties is directed to Local Civil Rule 7.2. Briefs shall not exceed 40 “ordinary typed or printed pages ***” (emphasis added). This page limitation shall be strictly enforced.

When submitting a brief in accordance with this rule a party may request special permission to submit an additional brief on any point or points deemed to need additional pages of argument. This request must be made by letter not to exceed two ordinary typed or printed pages and must be submitted with the brief.

The Court shall, in its sole discretion, decide whether to allow additional briefing on review of the party’s brief and letter.

The Court also reserves the right, in its sole discretion, to require additional briefing on any point or points after review of the written submissions of the parties or oral argument.